

Washington Journal of Law, Technology & Arts

Volume 11 | Issue 3

Article 2

10-1-2015

Throwing the Flag on Pay-for-Play: The *O'Bannon* Ruling and the Future of Paid Student-Athletes

Joseph Davison

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wjlta>



Part of the [Antitrust and Trade Regulation Commons](#), and the [Entertainment, Arts, and Sports Law Commons](#)

Recommended Citation

Joseph Davison, *Throwing the Flag on Pay-for-Play: The O'Bannon Ruling and the Future of Paid Student-Athletes*, 11 WASH. J. L. TECH. & ARTS 155 (2015).

Available at: <https://digitalcommons.law.uw.edu/wjlta/vol11/iss3/2>

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Journal of Law, Technology & Arts by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.

WASHINGTON JOURNAL OF LAW, TECHNOLOGY & ARTS
VOLUME 11, ISSUE 3 FALL 2015

THROWING THE FLAG ON PAY-FOR-PLAY: THE *O'BANNON* RULING AND
THE FUTURE OF PAID STUDENT-ATHLETES

Joseph Davison^{*}
© Joseph Davison

Cite as: 11 Wash. J.L. Tech. & Arts 155 (2015)
<http://digital.lib.washington.edu/dspace-law/handle/1773.1/1527>

ABSTRACT

A group of former and current football and men's basketball players, led by ex-UCLA basketball star Edward O'Bannon, brought an antitrust suit against the NCAA in the U.S. District Court for the Northern District of California. Their goal was to obtain an injunction ending the NCAA's rules preventing players from being paid for the use of their names, images, or likenesses. Relying in large part on a 1984 Supreme Court case, NCAA v. Board of Regents of the University of Oklahoma, the NCAA claimed that there are specific procompetitive justifications for the restrictions, namely, amateurism and competitive balance. The district court found that the alleged procompetitive justifications did not excuse the challenged restraints, a decision that the Court of Appeals for the Ninth Circuit recently upheld. Such rulings are contradictory to the fundamental principles of antitrust law and have the potential to eliminate the college sports product entirely.

^{*} Joseph Davison, University of Washington School of Law, Class of 2016. Thank you to Douglas Ross, adjunct professor at the University of Washington School of Law and partner at Davis Wright Tremaine LLP, for his invaluable advice and critique throughout the drafting of this Article.

TABLE OF CONTENTS

Introduction.....	157
I. Basics of Antitrust Law	157
II. <i>NCAA v. Board of Regents of the University of Oklahoma</i> ..	159
III. <i>O'Bannon</i> Background	160
A. <i>O'Bannon</i> Allegations	162
B. The NCAA's Procompetitive Justifications and the Courts' Findings	163
1. Amateurism	163
2. Competitive Balance	166
C. <i>O'Bannon</i> Ruling.....	167
IV. Analysis	168
A. The Challenged Restraints Are Necessary To Maintain Amateurism and Must Be Upheld	168
1. The <i>O'Bannon</i> Amateurism Ruling is a Frivolous "Tweak" of a Reasonable Restraint.....	169
2. The Challenged Restraints Play a Significant Role In Driving Consumer Demand Because They Create a Unique Product.....	172
3. The NCAA Restraints Are Valid as a Matter of Law Under <i>Board of Regents</i>	172
B. The <i>O'Bannon</i> Court's Competitive Balance Ruling Will Result in a Competitive Advantage for Wealthier Schools	173
C. Upcoming Litigation: <i>Jenkins v. National Collegiate Athletics Association</i>	175
D. The <i>O'Bannon</i> Ruling Will Have Devastating Results if Applied to <i>Jenkins</i>	177
1. The <i>O'Bannon</i> Court's Amateurism Ruling Could Make College Athletes More Similar To Professionals Than Students.....	177
2. The <i>O'Bannon</i> Court's Competitive Balance Ruling Could Allow Colleges To Bid Any Amount for a Student-Athlete.....	179
Conclusion	181
Practice Pointers.....	181

INTRODUCTION

Pay-for-play has long been an expression common to amateur sports. Typically, this phrase has described the athlete's burden, whether it be a high school student paying a try-out fee or a "walk-on" college student-athlete paying tuition. But, as the industry of college sports has grown, so too has the cry for compensating student-athletes for their role in the economic success. As such, the pay-for-play responsibility appears to be shifting to colleges and universities. This shift has resulted in an outbreak of antitrust action against the National Collegiate Athletic Association ("NCAA" or the "Association"), headlined by the recent *O'Bannon v. National Collegiate Athletic Association* case, which challenged the restrictions on paying student-athletes for the use of their names, images, and likenesses. More recently, *Jenkins v. National Collegiate Athletics Association* was filed, challenging all restrictions on paying student-athletes. This Article will consider the NCAA's arguments in *O'Bannon* and will identify the district court and the Ninth Circuit's errors in analyzing those arguments. To illustrate the errors of the courts' analysis, this Article will conclude with an evaluation of *O'Bannon*'s potential impact on the upcoming *Jenkins* suit.

I. BASICS OF ANTITRUST LAW

Section 1 of the Sherman Act states that no person may undertake a "contract, combination . . . or conspiracy, in restraint of trade."¹ Corporations, in fact, frequently cooperate with one another, and most of their cooperation is legal. Understanding when such cooperation is illegal requires a specific analysis, starting with the language of Section 1. While the statutory language initially appeared to the federal courts to bar every contract that restrained trade, the Supreme Court ultimately held it to prohibit only those restraints of trade that are unreasonable.² In

¹ 15 U.S.C.A. § 1 (West 2015).

² *Bd. of Trade of City of Chi. v. United States*, 246 U.S. 231, 239, 241 (1918). *See also* *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) ("Congress intended to outlaw only *unreasonable* restraints[.]").

implementing a broad standard of “reasonableness,” the Court developed a distinction between two kinds of Section 1 cases: (1) conduct that is “per se illegal” and (2) conduct that is subject to the “rule of reason.”³

There are certain agreements that, because of their injurious effect on competition and lack of any redeeming virtue, are presumed to be per se unreasonable and illegal without inquiry into specific harm or the business rationale for their use.⁴ Under current law, these consist of so-called “naked” agreements among competitors to eliminate competition.⁵ These include: (1) horizontal price-fixing, (2) horizontal market or customer allocation, and (3) horizontal concerted refusal to deal (boycotts).⁶ If the agreement is not per se illegal, it is traditionally subject to rule of reason analysis.⁷ Such analysis takes into account a variety of factors in considering whether the questioned practice imposes an unreasonable restraint on competition.⁸ In recent years, the Supreme Court and the Federal Trade Commission have suggested that, in some cases, the distinction may not always be “either/or” between the rule of reason and the per se rule, but may involve a more nuanced analysis into a restraint’s competitive effects known as a “quick-look” inquiry.⁹

Antitrust law also distinguishes between different kinds of conduct, depending on the position of the firms involved in the chain of distribution. Two parties are horizontal competitors if they compete on the same level of the market, for example, distribution, manufacturing, or sales.¹⁰ Vertical arrangements occur if one of the parties is an “upstream” participant in the market, potentially relying on the other to distribute the goods.¹¹ Section 1 of the

³ *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58 (1977).

⁴ *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

⁵ *Polk Bros. v. Forest City Enter.*, 776 F.2d 185, 188 (7th Cir. 1985).

⁶ *N. Pac. Ry. Co.*, 356 U.S. at 5.

⁷ *See generally Cont’l T.V., Inc.*, 433 U.S. at 58.

⁸ *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

⁹ *See, e.g., Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 89 (1984).

¹⁰ 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 83 (7th ed. 2012).

¹¹ *Id.* at 137.

Sherman Act applies to both horizontal and vertical agreements, but treats horizontal agreements much more harshly.¹² The reason for the distinction is simple: Head-to-head competitors ordinarily have little reason to legitimately cooperate or agree with one another. By contrast, vertical arrangements are essential for providing products to consumers.¹³

To state a claim under Section 1 of the Sherman Act, a plaintiff must allege “(1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce.”¹⁴ Once anticompetitive effects are ascertained, the burden shifts to the defendant to produce evidence of procompetitive justifications or effects.¹⁵ Procompetitive effects include “efficiency gains, the development or improvement of products, and other benefits to consumers and society.”¹⁶ If a procompetitive effect is established, the plaintiff must show a less restrictive alternative to the challenged restraints that outweighs the procompetitive justification.¹⁷

II. *NCAA v. BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA*

NCAA v. Board of Regents of the University of Oklahoma is frequently recognized as the governing law for challenges to restraints regarding amateurism in collegiate sports.¹⁸ In *Board of*

¹² *Id.* at 136.

¹³ *Id.*

¹⁴ *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1062 (9th Cir. 2001) (citation omitted).

¹⁵ *Id.* at 1063.

¹⁶ *California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1160 (9th Cir. 2011).

¹⁷ *See Sullivan v. Nat'l Football League*, 34 F.3d 1091, 1103 (1st Cir. 1994) (Any claimed benefit of the restraint “cannot outweigh its harm to competition, if a reasonable, less restrictive alternative to the policy exists that would provide the same benefits as the current restraint.”).

¹⁸ *See* Brief for the National Collegiate Athletic Association at 25, *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015) (No. 14-16601), ECF No. 13.

Regents, two universities challenged an NCAA limitation on the number of football games schools could license for telecast.¹⁹ The Court made clear that NCAA rules designed for preserving amateurism, including the rules prohibiting the compensation of student-athletes, are valid as a matter of law under the Sherman Act. The Court explained that collegiate athletics form “an industry in which horizontal restraints on competition are essential if the product is to be available at all.”²⁰ Though these rules will likely “restrain the manner in which institutions compete,” such a league would be impossible “if there were no rules on which the competitors agreed to create and define the competition to be marketed.”²¹ The Court recognized that NCAA sports have an identifiable academic tradition that differentiates them from professional sports to which they might otherwise be compared.²² In order to “preserve the character and quality of the ‘product,’” the NCAA must adopt certain rules, such as “athletes must not be paid, must be required to attend class, and the like.”²³ *Board of Regents* has since been reinforced by *American Needle v. National Football League*, which recognized that rules which define the essential character and quality of a product are procompetitive as a matter of law.²⁴

III. O'BANNON BACKGROUND

The plaintiffs in *O'Bannon v. National Collegiate Athletic Association*, a group of twenty current and former college student-athletes, brought an antitrust class action suit against the NCAA in 2009.²⁵ Plaintiffs played either Division I men's basketball or football between 1956 and the present.²⁶ They represent a certified

¹⁹ Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 89 (1984).

²⁰ *Bd. of Regents*, 468 U.S. at 100–01.

²¹ *Id.* at 101.

²² *Id.* at 101–02.

²³ *Id.* at 102.

²⁴ *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 203 (2010).

²⁵ *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 965 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015).

²⁶ *Id.* at 965.

class of all current and former student-athletes who “compete on, or competed on, an NCAA Division I . . . men’s basketball [or] . . . football team and whose images, likenesses and/or names may be, or have been, included . . . in game footage or in videogames licensed or sold by Defendants, their co-conspirators, or their licensees.”²⁷ Named plaintiff, Edward O’Bannon, was a student-athlete at the University of California, Los Angeles (“UCLA”) from 1991 to 1995.²⁸ He played on UCLA’s Division I men’s basketball team pursuant to the rules and regulations of the NCAA.²⁹

The NCAA is a membership-driven organization dedicated to protecting the well-being of student-athletes and equipping them with the skills to succeed both academically and athletically.³⁰ Founded in 1905, the Association includes roughly 350 Division I colleges and universities who, together, field more than 6000 athletic teams and 17,000 student-athletes.³¹ Today, the Association issues and enforces rules focused on promoting a balanced academic, social, and athletic experience for student-athletes.³² To that end, member colleges and universities have agreed on several basic principles for Division I athletics.³³ These include: (1) Student-athletes shall be amateurs in intercollegiate sports, and their participation should be motivated primarily by education and by the physical, mental, and social benefits to be derived, and (2) Student-athletes must be students whose athletic activities are conducted as an integral part of their educational experiences.³⁴ In accordance with these principles, the NCAA has allowed its member schools to provide student-athletes with

²⁷ *Id.*

²⁸ Order on NCAA’s and CLC’s Motion to Dismiss at 2, *O’Bannon*, 7 F. Supp. 3d 955 (No. C 09–3329 CW), ECF No. 142.

²⁹ *Id.*

³⁰ *About the NCAA*, NCAA, <http://www.ncaa.org/about> (last visited Sept. 23, 2015).

³¹ *Id.*

³² *NCAA Core Values*, NCAA, <http://www.ncaa.org/about/ncaa-core-values> (last visited Sept. 23, 2015).

³³ Defendant NCAA’s Trial Brief at 1, *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955 (No. C 09–3329 CW), ECF No. 184.

³⁴ *Id.* (internal quotation marks omitted).

scholarships for full “grant in aid,” defined as the total cost of tuition, fees, room and board, and required books.³⁵

A. O’Bannon *Allegations*

The *O’Bannon* Complaint alleged that the NCAA’s rules restricting compensation for the use of the names, images, and likenesses of men’s football and basketball players are illegal restraints of trade in violation of the Sherman Act.³⁶ Specifically, plaintiffs “challenge[d] the set of rules that bar student-athletes from receiving a share of the revenue that the NCAA and its member schools earn from the sale of licenses to use the student-athletes’ names, images, and likenesses in videogames, live game telecasts, and other footage.”³⁷ O’Bannon claimed that such regulations allow the NCAA to enter into licensing agreements to distribute student-athlete images which the student-athletes did not consent to, nor receive compensation for.³⁸ These actions allegedly exclude student-athletes from the collegiate licensing market and fix the price of student-athlete images at “zero.”³⁹ O’Bannon claimed that this conduct constitutes illegal price-fixing and a group boycott, violating Section 1 of the Sherman Act.⁴⁰ As such, O’Bannon requested, among other things, that the court enjoin the NCAA from enforcing any releases that purport to have caused any member of the class to relinquish rights to compensation for use of their names, images, and likenesses; and prevent any such agreements between the NCAA and its student-athletes in the future.⁴¹

³⁵ *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1054 (2015).

³⁶ Specifically, NCAA Bylaw Article 12.5.1.1 and Form 08-3a. *See* Order on NCAA’s and CLC’s Motion to Dismiss, *supra* note 28, at 2–3; *O’Bannon*, 7 F. Supp. 3d at 963.

³⁷ *O’Bannon*, 7 F. Supp. 3d at 963.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Class Action Complaint at 68–69, *O’Bannon*, 7 F. Supp. 3d 955 (No. C 09–3329 CW), ECF No. 1.

A two-week trial was held in June of 2014.⁴² The court found that the challenged rules unreasonably restrained trade and could not be justified by the NCAA's procompetitive arguments.⁴³ The Ninth Circuit has since upheld much of the district court's holding and its rationale.⁴⁴

B. *The NCAA's Procompetitive Justifications and the Courts' Findings*

Defendant NCAA argued that the challenged restraints create a unique product and promote consumer demand for college athletics.⁴⁵ As a result, the restraints expand consumer choice and encourage interbrand competition, the primary concerns of antitrust law.⁴⁶ The NCAA claimed its product is defined by the amateur status of the student-athletes and its competitive balance.⁴⁷ As such, both of these elements were presented as procompetitive justifications for the challenged restraints.⁴⁸

1. Amateurism

The NCAA claimed that the public watches college sports because they believe that the student-athletes are playing "for the love of the game and for the value and opportunities available to them from a college education."⁴⁹ To show that amateurism is an essential aspect of its product, the NCAA pointed to its long history of rules enforcing this tradition.⁵⁰ Additionally, the NCAA presented a number of consumer opinion surveys and testimony

⁴² *O'Bannon*, 7 F. Supp. 3d at 963.

⁴³ *Id.*

⁴⁴ See generally *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015).

⁴⁵ *O'Bannon*, 7 F. Supp. 3d at 973.

⁴⁶ Defendant NCAA's Post-Trial Brief at 19, 7 F. Supp. 3d 955 (No. C 09–3329 CW), ECF No. 279.

⁴⁷ *O'Bannon*, 7 F. Supp. 3d at 973.

⁴⁸ *Id.*

⁴⁹ Defendant NCAA's Post-Trial Brief, *supra* note 46, at 19.

⁵⁰ *Id.*

from various witnesses to support its argument.⁵¹ These surveys, which asked fans of Division I football and basketball how they would react to paying student-athletes, suggested that fans were generally opposed to a pay-for-play system.⁵² Finally, the NCAA cited the Supreme Court decision in the *Board of Regents* case to support its amateurism justification.⁵³

Both the district court and the Ninth Circuit acknowledged that the challenged restraints do promote amateurism and have some procompetitive value, but found that this did not justify the challenged restraints.⁵⁴ Initially, the district court reasoned that the historical evidence regarding the tradition of amateurism demonstrated an inconsistent approach to enforcement.⁵⁵ The court noted that in 1916, the NCAA adopted a rule stating that an amateur was “one who participates in competitive physical sports only for pleasure and the physical, mental, moral, and social benefits directly derived therefrom.”⁵⁶ Currently, the NCAA’s amateurism provision states that student-athletes “shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived.”⁵⁷ The court pointed out that these definitions are in stark contrast to each other, as evidenced by the focus on education in the current rule, which was not specifically mentioned in the 1916 definition.⁵⁸ Rather than exhibiting the NCAA’s “adherence to a set of core principles, this history documents how malleable the NCAA’s definition of amateurism has been.”⁵⁹ The court thus found the historical evidence presented by the NCAA to be unpersuasive.⁶⁰ The Ninth Circuit took a slightly different approach than the district court,

⁵¹ *O’Bannon*, 7 F. Supp. 3d at 999.

⁵² *Id.* at 975.

⁵³ *Id.* at 999.

⁵⁴ *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1072–73, 1079 (9th Cir. 2015); *O’Bannon*, 7 F. Supp. 3d at 1001.

⁵⁵ *O’Bannon*, 7 F. Supp. 3d at 973.

⁵⁶ *Id.* at 974.

⁵⁷ *Id.* at 974–75.

⁵⁸ *Id.* at 975.

⁵⁹ *Id.* at 1000.

⁶⁰ *Id.*

finding that “[e]ven if the NCAA’s concept of amateurism had been perfectly coherent and consistent” throughout its history, it still did not justify the challenged restraints.⁶¹

Turning to the consumer opinion surveys, the district court found these to contain several methodological flaws.⁶² Specifically, the surveys did not ask the consumers about the particular restraints challenged in this case.⁶³ Furthermore, the plaintiff presented several studies to counter the NCAA surveys.⁶⁴ After considering this evidence, the court found that the amateurism rules play only “a limited role in driving consumer demand for [Division I] football and . . . basketball-related products.”⁶⁵ The Ninth Circuit did not address the consumer surveys.

Finally, the NCAA argued that the Supreme Court made clear in *Board of Regents* that the NCAA’s restraints designed for preserving amateurism, including the rules prohibiting the compensation of student-athletes, are valid as a matter of law under the Sherman Act.⁶⁶ In addressing this argument, both the district court and the Ninth Circuit dismissed the relevant portions of the case as dicta, noting that “*Board of Regents* addressed limits on television broadcasting, not payments to student-athletes.”⁶⁷ Furthermore, the district court stated the industry of college sports has changed a great deal in the thirty years since the *Board of Regents* ruling.⁶⁸

⁶¹ *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1073 (9th Cir. 2015).

⁶² *O'Bannon*, 7 F. Supp. 3d at 1000.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 1001.

⁶⁶ Brief for the National Collegiate Athletic Association, *supra* note 18, at 22.

⁶⁷ *O'Bannon*, 7 F. Supp. 3d at 999; *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1063 (9th Cir. 2015).

⁶⁸ *O'Bannon*, 7 F. Supp. 3d at 1000.

2. Competitive Balance

The NCAA also claimed that the challenged restraints protect the competitive balance in college athletics.⁶⁹ The NCAA believes such competitive balance is essential to sustaining consumer demand for the product.⁷⁰ The Association claimed that the “Supreme Court has expressly noted that the NCAA’s restrictions . . . are tailored to the goal of competitive balance and are clearly sufficient to preserve competitive balance.”⁷¹ The NCAA also noted that the expert witnesses on both sides testified that if student-athletes were able to receive compensation from colleges for their names, images, and likenesses, recruits would be more likely to attend schools that would offer the greatest amount of money.⁷² The NCAA argued that this would shift the distribution of talent towards wealthier colleges, likely resulting in their greater success.⁷³ This shift in competitive balance would negatively affect the demand for college sports.⁷⁴

The district court found the NCAA’s argument unpersuasive.⁷⁵ The court cited several sports economists who all concluded that “the rules have no discernible effect on the level of competitive balance.”⁷⁶ This appeared to the court to be a logical conclusion given the money currently spent on other elements of recruiting.⁷⁷ For example, the schools the NCAA pointed to as the wealthy—who would seemingly be able to recruit the most talented players should the restraints be lifted—simply spend that money on

⁶⁹ *Id.* at 978.

⁷⁰ *Id.*

⁷¹ Defendant NCAA’s Post-Trial Brief, *supra* note 46, at 26 (internal quotation marks omitted).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *O’Bannon*, 7 F. Supp. 3d at 978. The NCAA focused the majority of its appellate argument on its amateurism justification. As such, the Ninth Circuit “accept[ed] the district court’s factual findings that the compensation rules do not promote competitive balance” without consideration of the NCAA’s original arguments or those made in its post-trial brief. *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1072 (9th Cir. 2015).

⁷⁶ *O’Bannon*, 7 F. Supp. 3d at 978.

⁷⁷ *Id.*

training facilities and coaching.⁷⁸ The court reasoned that the “fact that high-revenue schools are able to spend freely in these other areas cancels out whatever leveling effect the restrictions on student-athlete pay might otherwise have.”⁷⁹ Most importantly, the court found that even if the NCAA had sufficiently connected the current rules and competitive balance, it had not shown that a change in competitive balance would negatively affect consumer demand.⁸⁰

C. *O'Bannon Ruling*

Though the district court found that neither of these justifications was sufficient to justify the challenged restraints, it did hold that the amateurism argument plays a limited role in driving consumer demand and thus has a minimal procompetitive effect.⁸¹ Under the rule of reason, the next step would be a showing by the plaintiff of a less restrictive alternative to the challenged restraints that outweighs the procompetitive justification.⁸² *O'Bannon* presented such an alternative, which was adopted by the district court.⁸³ The court ruled that the member-schools must raise the restrictive cap on payments to student athletes to the full cost of attendance.⁸⁴ Full cost of attendance is defined as the full “grant in aid” plus non-required books, supplies, transportation, and other living expenses.⁸⁵ The court also found that colleges may allow for the creation of a trust for each student-athlete that can hold up to \$5,000 per year of attendance, payable when the student-athlete

⁷⁸ *Id.*

⁷⁹ *Id.* at 978–79.

⁸⁰ *Id.* at 979.

⁸¹ *Id.* at 1001.

⁸² Brief for Antitrust Scholars as Amici Curiae in Support of Appellant at 6, *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015) (No. 14–16601), ECF No. 17. *See also* *Sullivan v. Nat'l Football League*, 34 F.3d 1091, 1103 (1st Cir. 1994) (Any claimed benefit of the restraint “cannot outweigh its harm to competition, if a reasonable, less restrictive alternative to the policy exists that would provide the same benefits as the current restraint.”).

⁸³ *O'Bannon*, 7 F. Supp. 3d at 983.

⁸⁴ *Id.* at 1008.

⁸⁵ *O'Bannon*, 802 F.3d at 1054 n.3.

leaves school or is no longer eligible to play.⁸⁶ The court noted that the \$5,000 cap on additional compensation is “comparable to the amount of money that the NCAA permits student-athletes to receive if they qualify for a Pell grant.”⁸⁷

The Ninth Circuit affirmed in part, finding that “the NCAA’s rules have been more restrictive than necessary to maintain its tradition of amateurism in support of the college sports market.”⁸⁸ It continued by mandating “that the NCAA permit its schools to provide up to the [full] cost of attendance to their student athletes.”⁸⁹ But, the court vacated the district court’s judgment requiring the NCAA to allow its member schools to pay student-athletes up to \$5000 per year in additional compensation, stating that the “difference between offering student-athletes education-related compensation and offering them cash sums . . . is a quantum leap.”⁹⁰

IV. ANALYSIS

This section will identify the courts’ errors in analyzing the NCAA’s amateurism and competitive balance arguments against compensating student-athletes for the use of their names, images, and likenesses. To best illustrate the magnitude of such errors, this section will then identify the disastrous results the ruling would trigger if the courts’ rationale were followed in the upcoming *Jenkins* suit.

A. *The Challenged Restraints Are Necessary To Maintain Amateurism and Must Be Upheld*

In review, the district court held that the amateurism argument, though procompetitive, was insufficient to justify the challenged

⁸⁶ *Id.*

⁸⁷ *O’Bannon*, 7 F. Supp. 3d at 1008.

⁸⁸ *O’Bannon*, 802 F.3d at 1079. Again, because the NCAA focused its appellate argument on its amateurism justification, the Ninth Circuit did not analyze the NCAA’s earlier competitive balance arguments. *Id.* at 1072.

⁸⁹ *O’Bannon*, 802 F.3d at 1079.

⁹⁰ *Id.* at 1078–79.

restraints for three reasons: (1) the historical definitions of amateurism are inconsistent, (2) the amateurism rules play only “a limited role in driving consumer demand for [Division 1] football and . . . basketball-related products,” and (3) the *Board of Regents* case did not have precedential value. The Ninth Circuit came to the same finding, albeit through a different analysis of the historical definitions of amateurism and the *Board of Regents* case.

1. The *O'Bannon* Amateurism Ruling is a Frivolous “Tweak” of a Reasonable Restraint

The district court’s finding that the historical definitions of amateurism are too inconsistent to justify the restraints can be challenged on several fronts. First, while the NCAA’s definition has changed many times since 1905, the NCAA has consistently observed its central amateurism principle: Student-athletes should not be paid for their performance.⁹¹ Second, it is highly unrealistic to expect an association with hundreds of members and thousands of students to maintain a perfectly static definition of amateurism for over 100 years. To suggest that the changes in phrasing reflects a lack of commitment to the NCAA’s central principle is inconsiderate of the inevitable transformation and progression that an organization goes through over a long period of time, while still being able to maintain its core principle.⁹²

The Ninth Circuit took the position that even if the amateurism definition was consistent, the NCAA cannot justify the challenged restraints “simply by pointing out that it has adhered to those rules for a long time.”⁹³ The court agreed with the district court’s finding that there is a procompetitive effect to the NCAA’s commitment to amateurism, but found that the current restraints have “been more restrictive than necessary to maintain its tradition.”⁹⁴ As such, the

⁹¹ Brief for the National Collegiate Athletic Association, *supra* note 18, at 52.

⁹² The Ninth Circuit even acknowledged that the district court “probably underestimated the NCAA’s commitment to amateurism.” *O'Bannon*, 802 F.3d at 1073.

⁹³ *Id.*

⁹⁴ *Id.* at 1079.

court mandated that the NCAA permit its “members to give scholarship up to the full cost of attendance.”⁹⁵

In addressing the Ninth Circuit’s rationale, it is worth noting that the NCAA’s purpose in pointing to its various definitions of amateurism was not just to highlight the consistency of the definitions, but also to emphasize amateurism’s essential nature to the college athletic product—an argument supported by a variety of consumer opinion surveys. Furthermore, although the court’s ruling keeps student-athlete compensation within the NCAA’s standards of the amateurism definition, there are a host of problems with its justification for the ruling. The court acknowledged that the challenged restraints serve a procompetitive purpose: Promoting amateurism.⁹⁶ When a restraint is *reasonably* necessary to promote a procompetitive business purpose, it should be upheld.⁹⁷ As the Ninth Circuit itself admits, “it is not . . . [the] court’s function to tweak every market restraint that the court believes could be improved.”⁹⁸ In finding that the procompetitive effect does not justify the challenged restraints, the court is making a judgment call, second-guessing the rationale of the NCAA as to the most efficient way of maintaining its tradition of amateurism.

The court justifies its “tweak” by claiming that the challenged restraint is “patently and inexplicably stricter than is necessary to accomplish all of its procompetitive objectives.”⁹⁹ Not only is such description a gross overstatement, but it opens the door for further litigation. It seems disingenuous to describe a restraint as “patently and inexplicably stricter than is necessary,” but find that it need

⁹⁵ *Id.* at 1053.

⁹⁶ *Id.* at 1073.

⁹⁷ See *Am. Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1249–50 (3d Cir. 1975) (noting its objection to a court “second-guessing business judgments as to what arrangements would or would not provide ‘adequate’ protection for legitimate commercial interests”); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 227–28 (D.C. Cir. 1986) (“We do not believe . . . the Supreme Court intended that lower courts should calibrate degrees of reasonable necessity. That would make the lawfulness of conduct turn upon judgments of degrees of efficiency. There is no reason in logic why the question of degree should be important.”).

⁹⁸ *O’Bannon*, 802 F.3d at 1075.

⁹⁹ *Id.*

only be changed by a mere eleven percent, the difference between cost of attendance and full grant in aid.¹⁰⁰ This trivial difference not only shows that the ruling is frivolous, but it also sets the tone for future plaintiffs to make small additions to this cap, without needing to prove that a substantial change is warranted. The court acknowledges this point, admitting that there is “little doubt that plaintiffs will continue to challenge the arbitrary limit imposed . . . until they have captured the full value of their [name, image, and likeness].”¹⁰¹

¹⁰⁰ Average full grant-in-aid for an in-state undergraduate at a Pac-12 school for the 2015–16 academic year is \$31,053. To raise that amount to the full cost-of-attendance, the average increase in cost would be \$3,542, or 11%. This number is as low as 2% at schools such as University of Southern California. See Stephanie Loh, *Pac-12, MWC cost of attendance estimate*, SAN DIEGO UNION-TRIBUNE (Mar. 3, 2015), <http://www.sandiegouniontribune.com/news/2015/mar/03/aztecs-football-penn-state-cost-of-attendance-5000/>; *Tuition & Fees*, WASHINGTON STATE UNIVERSITY, <https://admission.wsu.edu/tuition-costs/tuition-break-down/> (last visited Dec. 15, 2015); *Cost of Attendance*, UNIVERSITY OF OREGON, https://financialaid.uoregon.edu/cost_of_attendance (last visited Dec. 15, 2015); *2015-2016 Estimated Cost of Attendance*, THE UNIVERSITY OF ARIZONA, <http://financialaid.arizona.edu/undergraduate/estimated-cost-attendance> (last visited Dec. 15, 2015); *Cost of Attendance*, OREGON STATE UNIVERSITY, http://financialaid.oregonstate.edu/review_costofattendance (last visited Dec. 15, 2015); *Cost of Attendance*, BERKELEY UNIVERSITY OF CALIFORNIA, <http://admissions.berkeley.edu/costofattendance> (last visited Dec. 15, 2015); *How Much Will My Education Cost?*, USC UNIVERSITY OF SOUTHERN CALIFORNIA, <http://www.usc.edu/admission/fa/undergraduates/admitted/how-much-will-my-education-cost.html> (last visited Dec. 15, 2015); *Fees, Tuition, and Estimated Student Budget*, UCLA, <https://www.admissions.ucla.edu/prospect/budget.htm> (last visited Dec. 15, 2015); *The Student Budget*, STANFORD, <http://financialaid.stanford.edu/undergrad/budget/> (last visited Dec. 15, 2015); *In-State Undergraduate Estimated Costs*, UNIVERSITY OF COLORADO BOULDER, <https://bursar.colorado.edu/tuition-fees/estimated-cost-of-attendance/in-state-undergraduate-estimated-costs/> (last visited Dec. 15, 2015); *Undergraduate cost of attendance*, ASU, <https://students.asu.edu/financialaid/coa/undergraduate> (last visited Dec. 15, 2015); *Total Cost of Attendance*, UNIVERSITY OF WASHINGTON, <https://admit.washington.edu/Paying/Cost> (last visited Dec. 15, 2015); *Cost*, THE UNIVERSITY OF UTAH, <http://admissions.utah.edu/cost/> (last visited Dec. 15, 2015).

¹⁰¹ *O'Bannon*, 802 F.3d at 1079.

2. The Challenged Restraints Play a Significant Role In Driving Consumer Demand Because They Create a Unique Product

After considering the consumer surveys, the district court found that the challenged restraints play only a limited role in driving consumer demand. This is a far too narrow view of the effect of the regulations. The challenged restraints drive consumer demand by distinguishing college sports from professional sports, which “enables a product to be marketed which might otherwise be unavailable.”¹⁰² The result is wider consumer choice, which is a traditional procompetitive benefit in antitrust law. Thus, the restraints play an essential role in driving consumer demand because they define a unique product.

3. The NCAA Restraints Are Valid as a Matter of Law Under *Board of Regents*

The district court and the Ninth Circuit concluded that, because the *Board of Regents* case only “addressed limits on television broadcasting, not payments to student-athletes,” the portions of the case that seemingly pertain to this case are simply dicta.¹⁰³ Similar to the district court’s ruling on the role of the restraints in driving demand, this view is far too narrow. The Supreme Court’s analysis of the rules against compensation of student-athletes was integral to the analytical framework the Court adopted. The Court itself stated that the challenged restraint in *Board of Regents* was unlawful because it did “not . . . fit into the same mold as do rules defining the . . . eligibility of participants.”¹⁰⁴ Thus, the eligibility of student-athletes was a substantial consideration in the *Board of Regents* analysis, just as it is in the amateurism analysis here.

¹⁰² Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 102 (1984).

¹⁰³ O’Bannon v. Nat’l Collegiate Athletic Ass’n, 7 F. Supp. 3d 955, 999 (N.D. Cal. 2014). *See also* O’Bannon, 802 F.3d at 1062 (“The *Board of Regents* Court certainly discussed the NCAA’s amateurism rules at great length, but it did not do so in order to pass upon the rules’ merits, given that they were not before the Court.”).

¹⁰⁴ *Bd. of Regents*, 468 U.S. at 118.

Even if the court determines that the amateurism analysis in *Board of Regents* is dicta, such analysis should be given considerable deference and adhered to except in the most extreme circumstances—circumstances not present here.¹⁰⁵ Indicating as much, every challenge to amateurism under the Sherman Act since the *Board of Regents* ruling has failed.¹⁰⁶

Additionally, the district court's claim that the industry of college sports has changed a great deal in the last thirty years is not persuasive. The court appears to be concerned that the increased commercialization of athletics over the last thirty years has made the *Board of Regents* ruling inapplicable. Although the revenue of college sports has exploded in recent years, college sports were already highly commercialized when *Board of Regents* was decided.¹⁰⁷ The NCAA manages this commercial pressure today as it did thirty years ago—by maintaining its commitment to its central amateurism and educational principles. In fact, the “eligibility rules [which] create the product . . . allow its survival in the face of commercialized pressures” by separating the students from commercial exposure.¹⁰⁸ As such, the precedent remains pertinent to this case until the Supreme Court rules otherwise or Congress acts contrary to the ruling.

B. *The O'Bannon Court's Competitive Balance Ruling Will Result in a Competitive Advantage for Wealthier Schools*

The district court's ruling that the NCAA's competitive balance argument does not justify the challenged restraints, while

¹⁰⁵ See *United States v. Augustine*, 712 F.3d 1290, 1295 (9th Cir. 2013) (“[C]onsidered Supreme Court dictum is special. We do not treat considered dicta from the Supreme Court lightly. Rather, we accord it appropriate deference.” (internal quotation marks omitted)).

¹⁰⁶ Brief Amici Curiae of American Council on Education, Association of Governing Boards of Universities and Colleges, and National Association of Independent Colleges and Universities in Support of Defendant-Appellant and Reversal at 13–14, *O'Bannon*, 802 F.3d 1049 (No. 14–16601), ECF No. 20.

¹⁰⁷ Brief for the National Collegiate Athletic Association, *supra* note 18, at 29.

¹⁰⁸ *McCormack v. Nat'l Collegiate Athletic Ass'n*, 845 F. 2d 1338, 1345 (5th Cir. 1988).

facially solid, has several anticompetitive cracks.¹⁰⁹ The court reasoned that money currently spent on training facilities and coaching cancels out the procompetitive effects that the challenged restraints are claimed to provide. Although it is true that high-revenue schools are already able to spend money on coaches and training facilities to attract student-athletes, these aspects of recruiting lack the feature of immediacy. Coaches and facilities are semi-permanent fixtures—they are not instantly removable and they often cannot be created or hired in a matter of days.¹¹⁰ Allowing universities greater flexibility to pay student-athletes adds an aspect of immediate competitive bidding to the recruiting process.

The ability to bid competitively, while normally a staple of antitrust law, in this case would allow the wealthier colleges to quickly react to the scholarship offers of other universities. A wealthy university, however, is unable to immediately construct a new training facility to better recruit an athlete suddenly interested in another school. After the *O'Bannon* ruling, a wealthier school will be able to make its initial scholarship offer, knowing that if a smaller school makes a recruiting push, it now has more room to raise the amount of money offered to the student-athlete. While this ability is somewhat mitigated by the cap on the available scholarship, the likely rise of the cap over time will allow greater flexibility to this potentially anticompetitive bidding process. As the Ninth Circuit recognized, there is “little doubt that plaintiffs will continue to challenge the arbitrary limit imposed . . . until they have captured the full value of their [name, image, and likeness].”¹¹¹ While the existing state of college recruiting may already hurt the competitive balance, the competitive balance will be damaged even further as universities are given additional

¹⁰⁹ As previously noted, the NCAA focused the majority of its appellate argument on its amateurism justification. As such, the Ninth Circuit “accept[ed] the district court’s factual findings that the compensation rules do not promote competitive balance” without consideration of the NCAA’s original arguments or those made in its post-trial brief. *O'Bannon*, 802 F.3d at 1072.

¹¹⁰ Coaches are typically under contract for extended periods of time, making it difficult and costly to fire one without just cause.

¹¹¹ *O'Bannon*, 802 F.3d at 1079.

flexibility in their ability to pay student-athletes.

C. *Upcoming Litigation: Jenkins v. National Collegiate Athletics Association*¹¹²

Jenkins v. National Collegiate Athletics Association is a federal class action case that was recently filed in the U.S. District Court for the Northern District of California and was assigned to the same judge who ruled on the *O'Bannon* case, Judge Wilken.¹¹³ No trial date has been set. Plaintiffs Martin Jenkins, Nigel Hayes, and Anfornee Steward are student-athletes who currently compete at Division I schools.¹¹⁴ They represent a class consisting of players in either Division I men's basketball or football who, at any time from the date of the Complaint through the date of the final judgment, received or will receive a written offer for a full scholarship.¹¹⁵ The defendants consist of the NCAA and the five major conferences: The Pacific-12, the South Eastern Conference, the Big Ten, the Big 12, and the Atlantic Coast Conference.¹¹⁶ Plaintiffs allege that the "[d]efendants have entered into what amounts to cartel agreements with the avowed purpose and effect of placing a ceiling on the compensation that may be paid to these athletes for their services."¹¹⁷ Under current NCAA and power conference rules, student-athletes may receive financial assistance only up to the full cost of attendance, in exchange for their services.¹¹⁸ The plaintiffs claim that the defendants have jointly conspired and agreed upon this restriction, and that such an agreement is illegal under Section 1 of the Sherman Act.¹¹⁹

¹¹² In June 2015, *Jenkins* and two other cases were consolidated into a case entitled *In re: NCAA Athletic Grant-in-Aid Cap Antitrust Litigation* before Judge Wilken.

¹¹³ Amended Complaint-Class Action Seeking Injunction at 1, *In Re: Nat'l Collegiate Athletic Ass'n Grant-In-Aid Cap Antitrust Litig.*, No. 4:14-md-02541 (N.D. Cal. Dec. 4, 2015), ECF No. 142.

¹¹⁴ *Id.* at 3–4.

¹¹⁵ *Id.* at 6.

¹¹⁶ *Id.* at 1.

¹¹⁷ *Id.*

¹¹⁸ *O'Bannon*, 802 F.3d at 1079.

¹¹⁹ Amended Complaint-Class Action Seeking Injunction, *supra* note 113,

The NCAA and the major conferences are “engaged in the business of . . . operating major college football and men’s basketball businesses, including the sale of tickets and telecast rights.”¹²⁰ Plaintiffs claim that, absent the challenged restrictions, the member-schools of each conference would vigorously compete for the services of certain basketball and football players in order to best succeed in this business.¹²¹ This competition would allegedly occur upon the removal of the limitations on the remuneration that players may receive for their athletic services.¹²² Without a cap, plaintiffs claim that schools would provide prospective athletes with recruiting inducements and offer to provide substantial benefits during their tenure as student-athletes, both of which are subject to significant restrictions by the NCAA and conference rules.¹²³

As support for their argument, plaintiffs note that member-schools are currently competing against each other for the services of student-athletes, but within the constraints of the rules prohibiting financial compensation beyond the price-fixed limits.¹²⁴ “[Student-athletes] are so desired that national media outlets closely track recruitments from as early as freshman year in high school until National Signing Day.”¹²⁵ Thousands of high school students are profiled and many are brought to individual campuses for a more personal recruitment experience.¹²⁶ Additionally, plaintiffs note that schools are constantly upgrading their athletic facilities and arenas to appeal to prospective student-athletes.¹²⁷

Plaintiffs argue the member-schools’ incomes are so great that competition would be vigorous and highly beneficial to student-athletes.¹²⁸ The sixty-five schools in the five power conferences

at 1.

¹²⁰ *Id.* at 7.

¹²¹ *Id.*

¹²² *Id.* at 8.

¹²³ *Id.* at 9–10.

¹²⁴ *Id.* at 18.

¹²⁵ *Id.*

¹²⁶ *Id.* at 19.

¹²⁷ *Id.*

¹²⁸ *Id.* at 18.

reported total revenues of 5.15 billion dollars in 2011–2012.¹²⁹ A significant portion of this revenue came from television rights to broadcast football and basketball games.¹³⁰ The popularity of the sports has become so profitable that individual conference broadcasting contracts have risen as high as three billion dollars.¹³¹ Overflowing with cash, restricted from competing for student-athletes, and with economic incentive to field the best team, the member-schools have directed their resources to the hiring of coaches and the construction of arenas and training facilities.¹³²

The most relevant difference between the *Jenkins* suit and the *O'Bannon* case is the scope of the challenged restraints. The *O'Bannon* Complaint focuses on the restraints preventing the compensation of student-athletes for the use of their names, images, and likenesses. Plaintiffs in *Jenkins* complain that *any* restraint on compensation to student-athletes or potential student-athletes has an anticompetitive effect on competition.

D. *The O'Bannon Ruling Will Have Devastating Results if Applied to Jenkins*

The NCAA is likely to present the same general justifications for its stance against compensating student-athletes in *Jenkins* as it did in *O'Bannon*. As *Jenkins* will be presided over by the same district court judge, it is very likely that those justifications will be similarly considered. This section will discuss the effect the rationale from *O'Bannon* would have on the *Jenkins* suit and any additional arguments in favor of the justifications, in light of the broad scope of *Jenkins*.

1. The *O'Bannon* Court's Amateurism Ruling Could Make College Athletes More Similar To Professionals Than Students

The district court and the Ninth Circuit in *O'Bannon* acknowledged that the NCAA's restraints do promote amateurism

¹²⁹ *Id.* at 19.

¹³⁰ *Id.*

¹³¹ *Id.* at 21.

¹³² *Id.* at 19.

and have some procompetitive value, but found that they did not justify the challenged restraints.¹³³ In doing so, the courts questioned the NCAA's means of maintaining its tradition of amateurism. The Ninth Circuit found the NCAA's restraints to be "patently and inexplicably stricter than is necessary," despite finding only an additional eleven percent of the scholarship needed to be added. While the Ninth Circuit attempted to make it clear that paying student-athletes a lump sum of money would violate the procompetitive goal of amateurism,¹³⁴ the *O'Bannon* ruling sets the tone for future cases to make additions to the scholarship cap. *Jenkins* presents an opportunity for the court to do just that.

It seems unlikely that the *Jenkins* court will completely eliminate the cap on how much student-athletes can be paid, in the face of the NCAA's amateurism argument. But if the courts were to continue to make small increases to the cap and maintain that the amateurism aspect remains intact, any semblance of the NCAA's historical idea of amateurism would disappear. If the cap were to continue to steadily increase, the amount of money that could, and likely would, be offered to student-athletes would make them more similar to professional athletes than amateurs and students. For example, the fair market value of a Louisville basketball player in 2012 was 1.5 million dollars per year.¹³⁵ The only Louisville player to be drafted into the NBA in the first round the following year currently makes 1.1 million dollars per year.¹³⁶ Comparably, this player would have made more as a college athlete than as a professional, if paid to scale. While it is unlikely

¹³³ *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1072–73, 1079 (9th Cir. 2015).

¹³⁴ The Ninth Circuit noted that the "difference between offering student-athletes education-related compensation and offering them cash sums . . . is a quantum leap." *O'Bannon*, 802 F.3d at 1078.

¹³⁵ Tony Manfred, *Here's How Much Big-Time College Athletes Should Be Getting Paid*, BUSINESS INSIDER (Mar. 20, 2013), <http://www.businessinsider.com/heres-how-much-college-athletes-are-worth-2013-3>.

¹³⁶ Associated Press, *Shabazz Muhammad, Gorgui Dieng finalize contracts with Timberwolves*, FOX SPORTS (July 14, 2013), <http://www.foxsports.com/north/story/shabazz-muhammad-gorgui-dieng-finalize-contracts-with-timberwolves-071413>.

that the cap would be raised that high, the Ninth Circuit acknowledged that the plaintiffs are going to continue to fight the arbitrary cap “until they have captured the full value of their [name, image, and likeness].”¹³⁷

2. The *O'Bannon* Court's Competitive Balance Ruling Could Allow Colleges To Bid Any Amount for a Student-Athlete

In rejecting the competitive balance justification, the *O'Bannon* court reasoned that such a balance would not be affected by compensating student-athletes because of the immense amount of money spent on new training facilities and coaches.¹³⁸ This rationale could have a devastating effect on competition if applied to the *Jenkins* suit and highlights the weaknesses of the *O'Bannon* court's rationale. Premium athletes are likely to receive offers from many wealthy schools. As the college sports industry has grown, more schools have built new facilities and paid top-dollar for coaches, as pointed out in the *O'Bannon* decision.¹³⁹ Building a

¹³⁷ *O'Bannon*, 802 F.3d at 1079.

¹³⁸ *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 978–79 (N.D. Cal. 2014).

¹³⁹ For example, since 2008, the majority of the fifteen teams in the Atlantic Coast Conference have undergone major football stadium renovations. See Robby Kalland, *LOOK: Renovations almost complete at Duke's Wallace Wade Stadium*, CBS SPORTS (Aug. 20, 2015), <http://www.cbssports.com/collegefootball/eye-on-college-football/25276051/look-renovations-almost-complete-at-dukes-wallace-wade-stadium>; *Kenan Stadium*, GOHEELS.COM, <http://www.goheels.com/ViewArticle.dbml?ATCLID=205912861> (last visited Dec. 15, 2015); *Sun Life Stadium Renovations for 2015*, HURRICANESPORTS.COM (Jan. 20, 2015), <http://www.hurricanesports.com/ViewArticle.dbml?ATCLID=209857165>; *Lane Stadium/Worsham Field*, HOKIESPORTS.COM, <http://www.hokiesports.com/football/lanestadium.html> (last visited Dec. 15, 2015); Bud Elliott, *Due to stadium renovations, Florida State to hold spring game in Orlando Citrus Bowl*, TOMAHAWKNATION.COM (Jul. 6, 2015), <http://www.tomahawknation.com/2015/7/6/8901239/florida-state-spring-game-orlando-citrus-bowl-stadium-renovation-fsu-football>; *Memorial Stadium Suite Renovations*, CLEMSON TIGERS (Oct. 18, 2013), http://www.clemsontigers.com/ViewArticle.dbml?DB_OEM_ID=28500&ATCLID=209288457; *BB&T Field*, WAKE FOREST SPORTS, <http://www.wakeforestsports.com/facilities/wake-bbt-field.html> (last visited Dec. 15, 2015); *Carl Smith Center, home of David A. Harrison III Field*

state-of-the-art training facility may be a significant recruiting tool for some athletes, but it will have no competitive advantage for those athletes who see such buildings at every school they consider. The only way to compete for those student-athletes would be to outbid all other schools.

The *O'Bannon* court capped the amount a student-athlete can be paid, temporarily mitigating this problem, but the *Jenkins* suit aims at eliminating all restrictive caps on paying student-athletes. While many schools are likely able to afford to pay student-athletes the full cost of attendance, the freedom to bid any amount could destroy competitive balance. The difference in earnings between colleges is so vast that the wealthiest group of schools could easily outbid those with lesser profits. For example, the top earning school in Division I college basketball for 2014 made nearly twenty-five million dollars in profit.¹⁴⁰ The twenty-fifth most profitable team earned just over seven million dollars.¹⁴¹ That is a seventy-two percent drop in profit in twenty-four spots; a difference that will grow significantly when considering the discrepancy between the top-earning school and the 200th or 300th school.¹⁴² The ability to bid any amount for the services of a student-athlete is unlikely to completely overshadow the millions of dollars spent on coaching and facilities. But with so many universities building such facilities and hiring notable coaches, prospective student-athletes are going to have to look elsewhere to differentiate between schools. The ability of the wealthiest schools to bid any amount to recruit a student would surely lead to competitive imbalance.

at *Scott Stadium*, UNIVERSITY OF VIRGINIA, <http://www.virginiasports.com/facilities/scott-stadium.html> (last visited Dec. 15, 2015).

¹⁴⁰ *College Basketball's Most Valuable Teams 2014*, FORBES (Mar. 17, 2014), <http://www.forbes.com/pictures/emdm45ehfd/1-louisville-cardinals-6/>.

¹⁴¹ *Id.*

¹⁴² There are 351 teams in Division I college basketball. *NCAA Division I Men's Basketball Team Scoring Per Game Statistics*, ESPN.COM, http://espn.go.com/mens-college-basketball/statistics/team/_/stat/scoring-per-game (last visited Dec. 15, 2015).

CONCLUSION

The purpose of antitrust law is to protect the consumer, which is why certain procompetitive factors can outweigh and justify anticompetitive restrictions. Both the district court and the Ninth Circuit in *O'Bannon* appear to have ignored such procompetitive justifications in light of the alleged injustice suffered by student-athletes. As such, the courts may have opened the door for the eventual elimination of the current college sports product. The *Jenkins* suit presents a dangerous opportunity for the court to do just that. If the *Jenkins* court follows the same rationale that it did in *O'Bannon*, despite the larger scope of *Jenkins*, college sports may begin to closely resemble professional associations. The elimination of such a sought-after product would only harm consumers and is contradictory to the fundamental principles of antitrust law.

PRACTICE POINTERS

- If a favorable *Jenkins* ruling allows athletes to negotiate any payment in exchange for attending a certain college, attorneys who work in sports law, as well as sports agents (many/most of whom are lawyers), may soon have a new field of clientele.
- A high school student and his parents may need to hire an attorney for advice on signing with a college and to review the contract the student will have to sign with the college. A familiarity with the relevant case law will be essential.

182 WASHINGTON JOURNAL OF LAW, TECHNOLOGY & ARTS [VOL. 11:3